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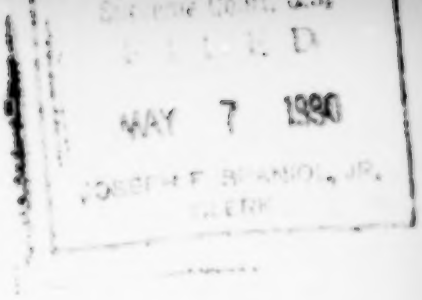

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

CATHY BURNS, *Petitioner,*

v.

RICK REED, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

May 7, 1990

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QUESTIONS PRESENTED

I. Is a deputy prosecutor entitled to absolute immunity when he gives approval to conduct which is known or should be known to him to be improper, namely, the authorizing of the use of hypnosis on a suspect?

II. Is a deputy prosecutor entitled to absolute immunity when he seeks a search warrant in a probable cause hearing and intentionally fails to fully inform the court by failing to state that the arrested person made an alleged confession while under hypnosis and yet had persistently denied committing any crime before and after the hypnosis?

III. Is a deputy prosecutor entitled to absolute immunity when he participates in the unlawful arrest of an individual when under state law the prosecutor possesses the same arrest powers as police officers?

IV. Are such activities individually and collectively outside the protected activities of initiating a prosecution and presenting the State's case?

[Note: Petitioner reserves the right to argue Question 5 in the event certiorari is granted on the above questions, but does not include Question 5 among the reasons for the grant of certiorari.]

V. Is it a question of fact for the jury to decide whether an activity is investigative when the veracity of the witnesses and the conflict in the testimony do not define the issue of immunity purely as a matter of law?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Cathy Burns and the respondent Rick Reed, Deputy District Attorney for Delaware County in Indiana.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

CATHY BURNS, *Petitioner,*

v.

RICK REED, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

The petitioner Cathy Burns respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on February 6, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 894 F.2d 949 and is reprinted in the appendix hereto, p. 1a, *infra*.

The decision of the United States District Court for the Southern District of Indiana (Dillin, D.J.) has not been reported. It has been transcribed and reprinted in the appendix hereto, p. 15a, *infra*.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983, the petitioner brought this suit in the Southern District of Indiana. Petitioner proceeded to trial and on November 4, 1988 the Southern District granted respondent's motion for a directed verdict.

On petitioner's appeal, the Seventh Circuit affirmed the District Court's order directing a verdict in favor of the

respondent on February 6, 1990. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The text of 42 U.S.C. § 1983 and Indiana Code provisions 33-14-1-3 (1971), 35-33-1-1 (1971), and 35-41-1-17 (1971) are reproduced verbatim in the appendix, p. 19a, *infra*.

STATEMENT OF THE CASE

This case was initiated by Cathy Burns on January 31, 1985, by the filing of a complaint in the United States District Court for the Southern District of Indiana against Rick Reed, the deputy prosecutor for Delaware County, Indiana.[1] Burns sought actual and punitive damages against Reed for a violation of her constitutional rights as Reed acted under color of state law. The district court had jurisdiction over the case pursuant to the provisions of 28 U.S.C. § 1343 (a)(3) and (4), as the suit was brought under 42 U.S.C. § 1983 to redress the deprivation of Burns's constitutional rights.

On the evening of September 2, 1982, an unknown person entered the home of Cathy (Sells) Burns[2], petitioner, located in Muncie, Indiana. The intruder shot the two children of Burns and attacked her with a blunt instrument. Burns was a reserve police officer working as a civilian radio dispatcher, and was able to fire one shot from her service revolver before the intruder overpowered her. She was awakened by one of her children and after assessing the injuries to both of them called the police

[1] The original complaint named ten defendants. The claims against defendants Muncie Police Department and several other individuals were dismissed by the trial court. The case continued against defendants Scroggins, Cox, and Stonebraker, who were investigating officers in the Muncie Police Department, and Rick Reed, deputy prosecutor for Delaware County, Indiana. Scroggins, Cox, and Stonebraker settled with Burns for sums of money totalling $250,001.00. The case against Reed continued to trial.

[2] Ms. Burns changed her surname from Sells to Burns when she married.

dispatcher. A message was scrawled on a mirror in the home with lipstick: "I took what you loved most." All three received medical treatment including emergency surgery at Methodist Hospital in Indianapolis, Indiana.

Two Muncie police officers, Cox and Scroggins, formed the opinion that Burns was a prime suspect in the shooting. Although there was no admissible or reliable evidence to establish probable cause, the officers remained focused on Burns. Burns took a voice stress test which revealed Burns was truthful in denying any involvement in the crime. Officer Cox believed Burns may have committed the crime but might be unable to reveal the facts because of some mental block.

It was at this time that the testimony of Officers Cox and Scroggins differs significantly from the testimony of deputy prosecutor Reed, defendant in the lower court. The police officers insisted that Reed was contacted before Burns was placed under hypnosis and that when his advice was sought, he authorized them to proceed with the hypnosis, despite being informed by Officer Scroggins that it was his belief that this hypnosis may be violating the law and that he knew from his training that it was improper to hypnotize a suspect. Reed, in his testimony, recalled no such conversation and testified only that he was contacted at home sometime after 5:00 p.m. the evening Burns was placed under hypnosis, September 21, 1981.

Cox and Scroggins videotaped the hypnosis but omitted recording the preliminary preparation. Under hypnosis Burns made statements which Cox and Scroggins interpreted as evincing a multiple personality. The videotape of the hypnosis shows that there was a post-hypnotic suggestion made by Officer Cox that Burns would not remember the hypnosis but would cooperate fully with the police in their investigation of the crime.

The record reflects that Reed came down in the evening to the office of Detective Cox and, according to the testimony of Cox and Scroggins, viewed the videotape of Burns while she was under hypnosis. Officer Cox offered his belief that Burns was a multiple personality and that her "alter-ego" was responsible for the crime. Reed, in his testimony, did not recall viewing the videotape. According to the testimony of Officers Cox and Scroggins, they obtained permission from Reed to arrest Burns. According to Officer Cox, there was a meeting in which it was decided that they would not reveal to the public that Burns had

been hypnotized or what their source of information was regarding various matters of evidence.

The following day, Officers Scroggins and deputy prosecutor Reed sought a search warrant from the Honorable Judge Betty Cole. At the hearing for the search warrant, the magistrate was told of Burns's "confession" but was not told that it was obtained while Burns was under hypnosis. The magistrate was also not told of the two stated claims of innocence made by Burns. Judge Cole issued the search warrant while totally unaware of the basis of the information presented by Reed.

Eight days after Burns was arrested and six days after the search warrant was obtained, Jack L. Stonebraker, police liaison with the Delaware County Prosecuting Attorney's Office, submitted an affidavit to Judge Cole in support of probable cause to issue an arrest warrant. Again, the information presented did not inform the court that the interrogation of Burns occurred while she was under hypnosis. Judge Cole issued the arrest warrant.

The State filed a charge of attempted murder against Cathy Burns. Various psychiatrists and psychologists examined Burns and each and every one found she was not a multiple personality. They found her to be a reasonably normal individual in fear of losing her children through pending child custody hearings and to be potentially suicidal because of her situation. The State's charge was challenged by a motion to quash the statements made by Burns while under hypnosis. Following the court's ruling, the prosecutor's office moved to dismiss the case against Burns and she was released.

Because of media attention and damaging statements made by the police and Reed, as well as remarks made by the fathers of the minor children, the civil court felt it was in the best interest of the children that they not be returned to their mother. The oldest child was allowed to return to live with Burns in 1986, but the younger child was not permitted to live with Burns by his father, nor was Burns permitted regular visitation as of 1988 by order of the court having jurisdiction over the custody question.

Following Burns's release, she attempted to regain her employment with the Muncie Police Department but was unable to do so because of accusations made during the employment hearing and in public by various police officers and deputy prosecutor Reed, who even gave a public interview indicating he

still considered her the primary suspect. His publicly defaming statements interfered with her ability to gain employment and continued to provide a basis for the fathers of the minor children to resist any type of contact that Cathy Burns wanted to have with her own children.

Burns sought psychiatric assistance from various professionals. One psychiatrist and another psychologist identified Burns's condition as the equivalent of Post Traumatic Stress Syndrome and presented evidence at trial of the impact and consequences of such a condition to her and her family.

The case went to trial before the district court and the court entered judgment for the defendant Reed on his motion for a directed verdict made at the conclusion of Burns's case-in-chief. Burns appealed to the United States Court of Appeals for the Seventh Circuit. That court, in an opinion by Chief Judge Bauer joined by Circuit Judges Cummings and Ripple, affirmed the trial court's decision, holding that the doctrine of absolute immunity barred Burns's claim against deputy prosecutor Reed.

REASONS FOR GRANTING THE WRIT

I

The Seventh Circuit's decision in *Burns v. Reed* extends the doctrine of absolute prosecutorial immunity beyond the limits this Court set forth in its decision in *Imbler v. Pachtman* and conflicts with decisions of other Circuits.

The Seventh Circuit has, without the authorization of precedent from this Court, extended the doctrine of prosecutorial immunity to include investigatory activity. The extension of this Court's holding in *Imbler v. Pachtman*, 424 U.S. 409 (1976) creates a genuine threat to the rights and liberties guaranteed by the United States Constitution and therefore deserves this Court's attention.

This Court in *Imbler* held explicitly that a prosecutor enjoys absolute immunity from suit under 42 U.S.C. § 1983 when the prosecutor acts toward "initiating a prosecution and in presenting the state's case." 424 U.S. at 431. This Court noted that the duties of a prosecutor involve actions beyond the initiation of a prosecution and the presentation of the state's case,

and indicated that in some of these activities the prosecutor functions as an administrator rather than as an officer of the court. The case presented in *Imbler*, however, did not require this Court to address these other issues. *Id.* at 431, n. 33.

The Seventh Circuit's decision presents this Court with the opportunity to decide these other issues, and the unwarranted extension of the *Imbler* holding and the threat it creates to constitutional liberties justifies this Court's hearing this case.

The activities Deputy Prosecutor Reed engaged in do not fall within the categories of initiating a prosecution or presenting the state's case. This Court has held that absolute prosecutorial immunity extends no further than necessary to protect those activities intimately associated with initiating a prosecution and presenting the state's case. *See Harlow v. Fitzgerald*, 457 U.S. 800, 811 (1982). Burns's complaint challenged Reed's authorization of the use of hypnosis, his action of securing a search warrant based upon an inadmissible and illegal interpretation of a confession, and his participation in an unlawful, warrantless arrest. The authorization of hypnosis and the securing of a search warrant are investigatory in nature while the participation in the arrest is a police function.

The question which must be addressed is whether deputy prosecutor Reed's activities of authorizing hypnosis and securing a search warrant are investigatory in nature or are quasi-judicial in nature. The Courts of Appeals for the Second, Tenth, and District of Columbia Circuits have held that prosecutors do not enjoy absolute immunity for investigatory functions. The Second Circuit, in *Liffiton v. Keuker*, 850 F.2d 73 (2d Cir. 1988) held that a prosecutor who applied to a court for a wiretap warrant was not engaged in a clearly prosecutorial function and therefore was not entitled to absolute immunity. Similarly, in *Barbera v. Smith*, 836 F.2d 96, *cert. denied*, — U.S. —, 109 S.Ct. 1338 , (2d Cir. 1988), the Second Circuit held that "the supervision of and interaction with law enforcement agencies in *acquiring* evidence which might be used in a prosecution" are "of a police nature and are not entitled to absolute protection." *Id.* at 100 (emphasis supplied). The *Barbera* court distinguished these unprotected activities from "the *organization, evaluation, and marshalling* of this evidence into a form that will enable the prosecutor to try a case or to seek a warrant, indictment, or order" as being protected by absolute immunity. *Id.* at 100-101.

The Court of Appeals for the District of Columbia Circuit characterized the obtaining of unconstitutional search warrants and arrest warrants as investigatory in nature and therefore not protected by absolute immunity in *McSurely v. McClellan*, 697 F.2d 309, *cert. denied*, 474 U.S. 1005 (D.C.Cir. 1982). The District of Columbia Circuit, in *Apton v. Wilson*, 506 F.2d 83 (D.C.Cir. 1974) held that prosecutorial immunity was not available when a civil rights claim "focuses on a prosecutor's actions in the course of directing police investigative activity." *Id.* at 91.

In this case, Burns contends that Reed's authorization of the use of hypnosis is an investigatory activity and therefore should not be protected by absolute immunity. Reed's actions are more akin to the supervision of law enforcement agencies in acquiring evidence which may be used in a subsequent prosecution, rather than the organization, evaluation, or marshalling of evidence that would enable the prosecutor to try a case. Reed was called upon by the police to give advice on whether they should hypnotize Burns. The record reflects that Reed was informed by the police officers that the use of hypnosis in this case was probably an illegal and unacceptable police procedure. Nevertheless, Reed authorized this hypnosis. The evidence Reed could marshall or organize for prosecution purposes did not exist when he authorized the hypnosis or obtained the search warrant and therefore his actions are not of the nature that could be protected by absolute immunity. Most importantly, if Reed did view the videotape, then he observed, even to an untrained eye, one of the most abusive instances of forensic hypnosis ever practiced. Indeed, the defendant could not locate an expert to defend its use.[3]

The second question which must be answered is whether the giving of legal advice is a protected activity under *Imbler*. This Court has never directly addressed the issue of whether the giving of legal advice by a prosecutor falls within the *Imbler* doctrine. The Court of Appeals for the Seventh Circuit, however, directly addressed this issue in *Henderson v. Lopez*, 790 F.2d 44 (7th Cir. 1986). In *Henderson*, the plaintiff had paid a judgment in a child support proceeding yet was contacted by the sheriff's office and informed that he should either surrender himself or face arrest for the failure to pay child support.

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[3] The plaintiff's expert on forensic hypnosis desired to use the videotape as an instructional tool to demonstrate unacceptable hypnotic techniques.

Henderson presented himself with his receipt showing he had paid the judgment and therefore had complied with the court. The sheriff took Henderson to the assistant state's attorney's office where he sought advice on what should be done with Henderson. Lopez, the assistant state's attorney, advised that Henderson should be taken to the Cook County jail where he was held for three days.

The Seventh Circuit held that the assistant state's attorney enjoyed absolute immunity against lawsuits arising out of the assistant state's attorney's giving of legal advice. Similarly, the Court of Appeals for the Eleventh Circuit has held that a prosecutor enjoys absolute immunity for giving advice to police officers on the question of probable cause for arrest. The Tenth Circuit, however, held in *Benevidez v. Gunnell*, 722 F.2d 615 (10th Cir. 1983), that a prosecutor would be protected only by qualified immunity from section 1983 damages arising out of legal advice given to police officers. Again, the division in the Circuits on this issue calls for this Court to finally decide the issue.

The Courts of Appeals throughout the nation are divided on the issue of whether a prosecutor enjoys absolute immunity for activities outside the scope of initiating a prosecution and presenting the state's case. The Second, Fifth, Tenth, and District of Columbia Circuits have held that a prosecutor enjoys only qualified immunity for his activities outside the protected scope. *See, e.g., Liffiton v. Keuker*, 850 F.2d 73 (2nd Cir. 1988); *Marrero v. City of Hialeah*, 625 F.2d 499 (5th Cir. 1980); *Rex v. Teeples*, 753 F.2d 840 (10th Cir. 1985); and *McSurely v. McClellan*, 697 F.2d 309 (D.C.Cir. 1982). The Seventh, Ninth and Eleventh Circuits have held that a prosecutor enjoys absolute immunity for his activities outside the protected scope. *See, e.g. Gobel v. Maricopa County*, 867 F.2d 1201 (9th Cir. 1989); and *Marx v. Gumbinner*, 855 F.2d 783 (11th Cir. 1988).

This division in the Circuits illustrates the need for this Court to address these issues and to provide guidance to the Circuits. Even the Seventh Circuit, in the instant case, seemed to invite review, mentioning on two separate occasions the variance in the circuits in applying the meaning of *Imbler*. *SeeBurns v. Reed*, 894 F.2d at 954, n. 3, 955, n. 5. In addition, other Circuits have recognized this difficulty. *See, e.g., Marx v. Gumbinner*, 855 F.2d 783, 789 (11th Cir. 1988); *Joseph v. Patterson*, 795 F.2d 549 (6th Cir. 1986). Without a clear rule of law from this

Court, a plaintiff's opportunity to redress genuine wrongs will depend directly on the geographical location of the prosecutorial abuse of constitutional rights. If a plaintiff brings suit in the Seventh, Ninth, or Eleventh Circuits, he or she will face insurmountable obstacles in successfully redressing the abuses of a prosecutor who violates the constitutional rights every citizen possesses. Worse, it will encourage police to hide behind prosecutors who extend their function to such a degree so as to participate in on-the-scene arrests, such as in this case. The continuity of deceit by police with the collusion of the prosecutor to and including the seeking of a search warrant will invite creative arrangements by which absolute immunity will extend to police activities. Indeed, the worst abuses may be protected by absolute immunity in those Circuits.

The Second, Fifth, Tenth, and District of Columbia Circuits, however, provide the opportunity for a wronged plaintiff to successfully pursue his or her claim against a prosecutor who has abused the constitutional rights of the plaintiff. The ability of a plaintiff to redress constitutional abuses should not be dependent on the geographical location of the abuses; therefore, this Court should decide the issues first pointed to in *Imbler* but which have remained unanswered.

CONCLUSION

For these various reasons, this petition for certiorari should be granted. Petitioner reiterates that Question 5 is presented herein, not as a reason for granting certiorari, but because in the posture of this case this is the only opportunity for petitioner to seek review of that question.

Respectfully submitted,

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In the

United States Court of Appeals

For the Seventh Circuit

No. 88-3397
CATHY BURNS,

Plaintiff-Appellant,

v.

RICK REED,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. IP 85-155-C—**S. Hugh Dillin**, *Judge.*

ARGUED JUNE 1, 1989—DECIDED FEBRUARY 6, 1990

Before BAUER, *Chief Judge*, CUMMINGS, and RIPPLE, *Circuit Judges.*

BAUER, *Chief Judge.* The present appeal is from the district court's order granting defendant's motion for a directed verdict in this action for damages under 42 U.S.C. § 1983. After hearing plaintiff's evidence, the district court determined that defendant, the Chief Deputy Prosecutor for Delaware County, Indiana, was absolutely immune from suit for the allegations testified to at trial. The question before the court is whether a state prosecutor is absolutely immune from suit under § 1983 for his acts of giving legal advice to two police officers about their proposed investigative conduct, and for eliciting misleading testimony from one of the officers in a subsequent probable cause hearing.

I. BACKGROUND

Muncie, Indiana police officers Paul Cox and Donald Scroggins were assigned to investigate a September 2, 1982, incident in which an unknown assailant entered Cathy Burns' home and rendered her unconscious by striking her with a blunt object. The intruder then shot Burns' sons Eddie Griffin and Denny Sells two times apiece while they slept. Before leaving, the assailant used a lipstick to scrawl the following message on Burns' bathroom mirror: "I took what you loved most." When Burns regained consciousness, she called the police in a hysterical state and reported the incident. She and her sons were subsequently taken to a local hospital and treated for their wounds.

After conducting an initial investigation of the incident, Officers Cox and Scroggins concluded that Burns was their prime suspect. They questioned Burns on numerous occasions after the incident, but she repeatedly denied shooting her sons. The officers asked Burns to submit to a polygraph examination. She did so, and the examination results supported her claims of innocence. Unpersuaded, Cox and Scroggins asked Burns to submit handwriting exemplars; these were also exculpatory. After conducting a voice stress test with negative results, the officers reached the only conclusion that would save their theory of the case: Burns was a multiple personality.

On September 21, 1982, the officers questioned Burns once more. This time, they persuaded her to submit to questioning under hypnosis as the only way to flesh out any further evidence concerning the incident. Before proceeding, Officer Cox reminded Scroggins that during their police academy training, it was stressed that the use of hypnosis on criminal suspects or defendants was an unacceptable investigative technique. Cox's recollection prompted the officers to call Chief Deputy Prosecutor Richard Reed, the police liaison attorney, to inquire about the propriety of placing Burns under hypnosis and questioning her. That afternoon, Scroggins called Reed at his

home and informed him of their desire to hypnotize Burns because she was the only one who could provide them with "additional information" about the incident. Scroggins testified that he informed Reed that Burns was their prime suspect in the shooting. Nonetheless, Reed told the officers that if hypnotizing Burns was their only remaining avenue, they should proceed.

With the assistance of an employee at a local supermarket chain, the officers hypnotized Burns and questioned her about the incident. During the video taped questioning, Burns described her assailant as someone wearing overalls, a halloween mask, and a dark wig. She also referred to the assailant as "Katie." After further questioning by the officers, Burns also made reference to herself as "Katie." The officers interpreted this response as evidence supporting their split personality theory and as a "confession" by Burns' other "self." When Burns was taken out of the hypnotic state, she reiterated her assertion that she had nothing to do with the shooting of her sons.

Soon after the hypnotic session, Officers Cox and Scroggins met with Reed at the station to ask his opinion about whether they had probable cause to arrest Burns. Reed stated that he thought they did. On the following day, Reed appeared at a probable cause hearing before a county court judge to obtain a warrant to search Burns' house and automobile. During that hearing, Reed elicited testimony from Officer Scroggins regarding Burns' alleged confession. At no point in the hearing did Reed ask Scroggins to clarify that Burns' alleged confession was in fact his interpretation of her hypnotically induced statements about "Katie." On the basis of Scroggins' misleading testimony, the judge found that there was probable cause to issue a search warrant. Burns' house and car were subsequently searched for items relating to the shooting.

On September 28, 1982, the judge issued a warrant for Burns' arrest after Jack L. Stonebraker, an investigator for the office of the Delaware County Prosecuting Attorney, submitted an affidavit in support of probable

cause. Again, the judge was not informed that the alleged confession was obtained while Burns was under hypnosis. After the judge issued the warrant, Burns was arrested for attempted murder and was detained in the psychiatric ward of Ball Memorial Hospital for four months.[1] During that time, Burns was observed and tested by several medical experts who concluded that she did not suffer from a multiple personality. For example, the doctor who was asked to examine Burns to determine her mental competency to stand trial offered the following conclusion:

> I do not find sufficient criteria to make a diagnosis of multiple personality. There are no episodes of depersonalization nor abrupt changes in personality. There were no homicidal ideation or inappropriate interactions with staff or family members. She is able to handle the stress of being on a psychotic unit as well as a fear of losing custody of her children and her employment with maturity. I doubt very much that Cathy shot her children. Dr. Phillip Coons of LaRue Carter Hospital in Indianapolis provided psychiatric consultation. Dr. Coons has had extensive training and experience with multiple personalities. It is of interest to note that he concurs that this patient does not have a multiple personality.

Prior to Burns' trial, the court granted her motion to quash the statements she made to officers Scroggins and Cox while under hypnosis. In the face of this development, the prosecutor's office dismissed all pending criminal charges against Burns. Nevertheless, Reed allegedly stated to the press that he thought Burns was in fact guilty of the crimes that had been charged.

At the conclusion of the foregoing ordeal, Burns filed the present § 1983 suit in federal court against Officers

[1] While Burns was detained, the state sought to obtain custody of her two sons based upon her alleged "confession." Burns was also discharged from her employment as a radio dispatcher for the Muncie Police Department.

Cox and Scroggins, Chief Deputy Prosecutor Reed, Investigator Stonebraker, as well as numerous other Muncie Police officials. Burns alleged, among other things, that the defendants violated her constitutional rights under the color of law. Each of the defendants moved for summary judgment, claiming that they were immune from suit. The district court denied the qualified immunity defenses of Cox and Scroggins because it found that their actions may well have violated Burns' clearly established constitutional rights. The court also denied Reed's claim of absolute immunity for his activities because Reed could not recall the vital facts regarding his role in the decisions to hypnotize Burns, to seek a search warrant, and to obtain a warrant for her arrest. Therefore, the court was unable to determine whether Reed was acting within the scope of his prosecutorial duties. Accordingly, it concluded that there were genuine issues of material fact which precluded summary judgment on Reed's behalf. Finally, the court found that investigator Stonebraker was neither absolutely nor qualifiedly immune from suit for submitting a knowingly false affidavit to the judge at the probable cause hearing.

Prior to trial, Officers Cox and Scroggins made a combined offer of judgment to Burns in the amount of $150,000. Stonebraker, in turn, made an offer of judgment in the amount of $100,000. Burns accepted these offers and proceeded to trial against Reed. Upon the close of Burns' case in chief, Reed moved for a directed verdict pursuant to Fed. R. Civ. P. 50. The parties briefed the motion and on November 8, 1988, the trial court entered a directed verdict in favor of defendant. The court found that Reed's act of giving legal advice to officers Cox and Scroggins and his appearance before the judge to seek the search and arrest warrants constituted conduct for which Reed was absolutely immune from suit. Burns timely filed the present appeal.

II. ANALYSIS

Burns' central claim on appeal is that the district court committed reversible error when it determined that Reed was absolutely immune from suit for both the act of advising the officers that they should proceed to hypnotize her and for his act of eliciting false testimony during the probable cause hearings.[2] She contends that Reed's acts do not enjoy absolute immunity because they fall outside the scope of his prosecutorial duties since his conduct related to the investigation of her case. In light of this Circuit's interpretation of the Supreme Court's decision in *Imbler v. Patchman*, 424 U.S. 409 (1976), we conclude that the district court properly granted the defendant's motion.

In *Imbler*, the Court held that a prosecutor enjoys absolute immunity from suits for damages under 42 U.S.C. § 1983 when he or she acts toward "initiating a prosecution and in presenting the state's case." *Id.* at 431. After reviewing the basis for a prosecutor's absolute immunity from a malicious prosecution suits at common law—that

[2] Appellant also claims that the trial court applied an improper standard when it granted defendant's motion for a directed verdict because she presented a prima facie case against defendant. *See Hampton v. Hanrahan*, 600 F.2d 600, 607-08 (7th Cir. 1979). This argument misapprehends the basis for the district court's directed verdict in the present case. The determination of whether a prosecutor was acting within his or her quasi-judicial capacity and thus absolutely immune from suit is a legal question. If properly raised by the defendant, it is a matter to be decided by the trial court in light of the particular facts of the case regarding the actual conduct of the defendant. *Rakovich v. Wade*, 850 F.2d 1180, 1201 (7th Cir. 1988) (en banc) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985)). The district court granted Reed's motion for a directed verdict only after hearing the entirety of plaintiff's evidence against him and determining that Reed's alleged conduct fell within the ambit of his quasi-judicial functions as a prosecutor. The district court's reasoning makes it clear that it was applying the proper standard for a directed verdict in the context of an absolute immunity claim. *Rakovich*, 850 F.2d at 1204.

is, the functional comparability between the discretionary judgments of a prosecutor regarding evidence and that of a judge deciding a case—the Court determined that "the same considerations of public policy that underlie the common-law rule likewise countenance absolute immunity under § 1983." *Id.* at 424. One of the Court's central considerations was that if only qualified immunity were extended to the discretionary acts of a prosecutor, he or she would be open to suits that would undermine the performance of his or her responsibilities by diverting the prosecutor's energy and attention "away from the pressing duty of enforcing the criminal law." *Id.* at 425. The upshot would be that:

> public trust of the prosecutor's office would suffer if he [or she] were constrained in making every decision by the consequences in terms of his [or her] own potential liability in a suit for damages. Such suits could be expected with some frequency, ... Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials.

Id. at 424-25. Finally, the Court reasoned that if prosecutors approached their law enforcement duties ever fearful of their potential liability, the criminal justice system as a whole would be impaired. *Id.* at 426-27.

In determining that a prosecutor's absolute immunity at common law applies to suits under § 1983, the Court explicitly reserved the question of whether absolute immunity also extends to "those aspects of the prosecutor's responsibility that cast him [or her] in the role of an administrator or investigative officer rather than an advocate." *Id.* at 430-31. Moreover, the Court fully recognized that under its functional test, the sundry duties of a prosecutor would not always be easy to pigeon-hole:

> We recognize that the duties of the prosecutor in his [or her] role as advocate for the State involve actions preliminary to the initiation of a prosecution and ac-

> tions apart from the courtroom. A prosecuting attorney is required constantly, in the course of his [or her] duty as such, to make decisions on a wide variety of sensitive issues. These include questions whether to present a case to the grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present. Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence. At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court. Drawing the proper lines between these functions may present difficult questions . . . .

Id. at 431 n. 33.

The Court's functional test for determining the reach of a prosecutor's absolute immunity has engendered a case-by-case approach to the question. *See Marx v. Gumbinner*, 855 F.2d 783, 789 (11th Cir. 1988) ("the dividing line is amorphous, and the process of determining on which side of the line particular kinds of conduct fall has proceeded on a case-by-case basis").[3] In this circuit, which

[3] Ironically, the case-by-case approach engendered by the Court's functional test may well undercut, in part, the rationale supporting absolute immunity. As the Court noted in *Imbler*, "absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity." *Imbler*, 424 U.S. at 419 n.13. The rationale, of course, is to avoid the personal, institutional and social cost associated with such suits. *See e.g. Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (highlighting the personal and social costs of suits against public officials). However, since the conduct, for example, of a prosecutor in initiating a case as opposed to conducting investigative activities is not altogether clear and can be arguably placed on either side of the prosecution/investigation line, cases involving such claims often proceed to the federal appellate courts for resolution. *See e.g. Marx*, 855 F.2d at 789 n.10 (citing cases).

has visited the issue on a number of occasions, the functional test has been applied broadly in instances where state officials are required or called upon to render legal opinions or advice. For example, in *Mother Goose Nursery Schools, Inc. v. Sendak*, 770 F.2d 668, 671 (7th Cir. 1985), we reaffirmed that the Indiana Attorney General acts in a quasi-judicial capacity when reviewing the legality and form of state contracts pursuant to state statute. *Id.* at 671 (reaffirming *Citizen Energy Coalition of Indiana, Inc. v. Sendak*, 594 F.2d 1158 (7th Cir. 1979)). With reference to the Attorney General's determination of the legality of a contract, we likened this duty to "the everyday 'work' of lawyers and judges," and found it distinguishable from mere ministerial tasks. *Id.* at 674 n.4. Upon applying the factors enumerated in *Butz v. Economou*, 438 U.S. 478 (1978), for determining whether official conduct enjoys absolute immunity,[4] we concluded that the Indiana Attorney General is absolutely immune from suit under § 1983 when making such legal determinations. *Id.* at 471-75.

In *Henderson v. Lopez*, 790 F.2d 44 (7th Cir. 1986), we drew upon our analysis in *Mother Goose* to determine whether an Illinois state's attorney is absolutely immune from suit when giving advice to a county sheriff about

[4] We determined that the Supreme Court's decision in *Butz v. Economou* required consideration of three factors:

> First, we examine the historical or commonlaw basis for the immunity in question. Second, we examine whether the functions which the official performs subjects him to the same obvious risks of entanglement in vexatious litigation as is characteristic of the judicial process. With this second factor we consider the possibility that losers will bring suit against the decision-makers in an effort to retaliate the underlying conflict and 'charg[e] the participants in the first with unconstitutional animus.' And third, we consider whether the official is subject to checks upon abuses of authority, such as the correction of error on appeal.

Mother Goose, 770 F.2d at 671 (citations to *Butz*, 438 U.S. at 512, omitted).

whether to detain an individual on contempt charges. Upon reviewing the factors delineated in *Butz*, we concluded that an assistant state's attorney functions in a quasi-judicial role when providing such legal advice to county officials. Accordingly, we held that a state's attorney is absolutely immune from suit under § 1983 for the consequences of his or her legal advice. *Id.* at 47.

A number of other circuits have reached similar conclusions by applying the Supreme Court's functional analysis in *Imbler*. In *Marx v. Gumbinner*, 855 F.2d at 790, for example, the Eleventh Circuit held that a prosecutor rendering legal advice to police officers regarding the existence of probable cause to make an arrest is absolutely immune from suit. The court reasoned that a prosecutor's legal determination regarding the existence of probable cause is part and parcel of the larger process of determining whether to initiate a prosecution. The *Marx* Court thus concluded that a prosecutor's act of rendering legal advice about an arrest was within the ambit of prosecutorial activity covered by the Supreme Court's decision in *Imbler*. *Id.* at 790-91. Similarly, in *Myers v. Morris*, 810 F.2d 1437 (8th Cir.) *cert. denied*, 108 S. Ct. 97 (1987), the Eighth Circuit held that a prosecutor is absolutely immune from suit when he or she provides "advice of law to enforcement officials concerning the existence of probable cause and the prospective legality of the arrest." *See also Thomas v. Riddle*, 673 F. Supp. 262, 264 (N.D. Ill.1987) (applying *Henderson*). On the other hand, the Tenth Circuit has reached the opposite conclusion, a decision which it recently reaffirmed.[5]

[5] In *Wolfenbarger v. Williams*, 826 F.2d 930 (10th Cir. 1987), the Tenth Circuit revisited its decision in *Benavidez v. Gunnell*, 722 F.2d 615, 617 (10th Cir. 1983) (district attorney is not absolutely immune from suit for giving legal advice to police officers), in light of this circuit's decision in *Henderson*. The *Wolfenbarger* Court declined to overrule *Benavidez* and reaffirmed that a district attorney's act of giving legal advice to police officers is not protected by absolute immunity.

The question presented in the case at hand is whether the reach of our decisions in *Henderson* and the other circuits' decisions in *Marx* and *Myers* should be extended to instances where a state prosecutor is asked by a police officer to provide a legal opinion about the propriety of proposed investigative conduct.[6] Following this Circuit's reliance on *Butz*, we conclude that a prosecutor is absolutely immune from suit when acting as a legal advisor to police officers.

Admittedly, our review of the historical or commonlaw basis for the immunity in question does not yield any direct support for the conclusion that a prosecutor's immunity from suit extends to the act of giving legal advice to police officers. Nonetheless, an early decision by the Indiana Supreme Court reveals the breadth of the reasoning supporting the immunity at commonlaw. In holding that a prosecutor is absolutely immune from suit for malicious prosecution, the court drew upon the following principle:

> Whenever duties of a judicial nature are imposed upon a public officer, the due execution of which depends upon his judgment, he is exempt from all responsibility by action for the motives which influence him and the manner in which said duties are performed. If corrupt, he may be impeached or indicted; but he cannot be prosecuted by an individual to obtain redress for the wrong which may have been done.

Griffith v. Slinkard, 146 Ind. 117, 119, 44 N.E. 1001, 1002 (Ind. 1896) (quoting Townsh. Sland. & L. (3d Ed.) § 227, pp 395-96)). Under this articulation of the commonlaw principle, the dispositive question is whether the conduct of

[6] At the outset, we must reject appellant's contention that Reed's act of presenting evidence before the county judge in the probable cause hearings was part of the investigative stage of the case rather than action taken "in initiating a prosecution and in presenting the state's case." *Imbler*, 424 U.S. at 431.

the prosecutor is of a judicial nature and requires the prosecutor to exercise analogous judgment. In *Henderson*, we concluded that when a state's attorney serves as the legal advisor to county officials, she functions in a manner similar to both her role as a prosecutor and to that of a judge. "[I]n both functions, the state's attorney has the responsibility to review the facts of a given case and to arrive at an opinion concerning legality. . . . when functioning as an advice giver, the state's attorney has the ultimate decision on legality." *Henderson*, 790 F.2d at 46. This same conclusion applies here since an Indiana prosecutor's statutory responsibilities are sufficiently parallel to those of an Illinois state's attorney. *See* I.C. 33-14-1-3 and 33-14-1-4.

Under *Butz*, the second factor we must consider is whether the prosecutor's functions as a legal advisor to police officers subjects the prosecutor to "the same obvious risks of entanglement in vexatious litigation as is characteristic of the judicial process." *Mother Goose*, 770 F.2d at 671. We have little doubt that a prosecutor's risk of becoming entangled in litigation based on his or her role as a legal advisor to police officer is as likely as the risks associated with initiating and prosecuting a case. As the present case illustrates, police officers do turn to a prosecutor when they are uncertain about the legality of a possible investigative technique. And this is as it should be. We do not hesitate to recognize that the decision at hand should be guided, in part, by sound policy considerations. With that in mind, it is entirely likely that if prosecutors were granted only qualified immunity from suits for conduct relating to their role as the officers' legal advisor, the end result would be to discourage prosecutor's from fulfilling this vital obligation. Police officers, in turn, would be left to take their best guess as to what a suspect's rights are. On balance, one of the central goals of the criminal justice system would be dramatically undercut. Police officers will be less well-informed about both their ability to employ certain investigative techniques,

and the possibility that their proposed conduct will violate the rights of their suspects.

The third factor which we must consider is whether there are sufficient checks upon the prosecutor to prevent abuses of the authority to render legal opinions free from liability. The first check upon such abuses lies in the judicial process itself. As the Supreme Court has recognized, "the judicial process is largely self-correcting: procedural rules, appeals and the possibility of collateral challenges obviate the need for damages to prevent unjust results." *Mitchell v. Forsyth*, 472 U.S. 511, 522-23 (1985). Prosecutors well know that investigative techniques resulting in the violation of a suspect's constitutional rights will result in the suppression of evidence prior to trial or on appeal. Furthermore, a prosecutor who abuses his or her powers will have to answer to the electorate every four years. *See* Ind. Const., art. 7, § 16 (prosecutors elected every four years). Additionally, a prosecutor may be professionally disciplined. *Imbler*, 424 U.S. at 429. Consideration of the foregoing factors reveals that a prosecutor should be afforded absolute immunity for giving legal advice to police officers about the legality of their prospective investigative conduct. We emphasize that a prosecutor steps outside of his or her quasi-judicial role when he or she actually participates in investigative conduct. Under our decision, such conduct is not accorded absolute immunity.

The remaining question is whether Reed merely gave legal advice to Officers Cox and Scroggins or whether he participated in the investigation. The officers testified that they called Reed at his home to seek his advice about the propriety of their intentions to hypnotize and question the appellant. Officer Cox testified that they called Reed because he was the police liaison for the Prosecutor's office. Both officers emphasized that they were seeking Reed's legal opinion about their proposed course of action. Based on the foregoing testimony, it is apparent that Reed was rendering legal advice to the officers and

should be immune from suit, even if he did render unsound advice.[7]

For the foregoing reasons, the district court's order directing the verdict in favor of the defendant is hereby

AFFIRMED.

RIPPLE, *Circuit Judge*, concurring. I concur in the judgment and opinion of the court. I write separately to stress the limited scope of the court's holding. The court holds that a prosecutor enjoys absolute immunity with respect to *legal advice* given to law enforcement officers; it does not hold that such absolute immunity necessarily extends to situations in which the prosecutor goes beyond rendering legal advice and assumes responsibility for the management of the investigation. The line between rendering legal advice and making policy decisions during an investigation is a relatively difficult one. *See Imbler v. Pachtman*, 424 U.S. 409, 431 n.33 (1976). Here, however, the record supports the district court's explicit conclusion that the prosecutor's role was limited to rendering legal advice. On that basis, I join the judgment and opinion of the court.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[7] Appellant also argues that Reed's act of rendering a legal opinion to Officers Cox and Scroggins was the equivalent of a final decision by an official policy maker. Although the Supreme Court has confirmed that a single decision by a public official can amount to a policy decision, Reed did not purport to do anything more than render his opinion about the conduct being proposed. *See Pembaur v. Cincinnati*, 475 U.S. 469, 484 (1986) (respondent did not merely give legal advice, but was statutorily empowered to establish county policy). Appellant's reliance on *Pembaur* is unavailing under these facts.

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Appendix B
Opinion of the United States District Court
for the Southern District of Indiana
Dillin, D.J.

The following is a reproduction of the transcript of the District Court's decision on the motion for a directed verdict made by Mr. David Nowak, attorney for Rick Reed, on November 4, 1988.

THE COURT: When we began this case, there were four areas in which the defendant was charged with violating the constitutional rights of the plaintiff. One was that he authorized this hypnosis. Another was that he participated in the arrest without a warrant and in obtaining a search warrant without probable cause and that he defamed or slandered the plaintiff after she was released by making certain statements to the newspapers.

According to the *Henderson* case, a prosecuting attorney or deputy prosecuting attorney has absolute immunity when what he does is done in a quasi-judicial role. I am sure there is no dispute about that fact as established in *Imbler v. Pachtman*, the Supreme Court case.

The question is whether he is operating in a quasi-judicial role. The *Henderson* case, which is a Seventh Circuit interpretation of *Imbler v. Pachtman* to some extent at least, even though it doesn't mention it, sets up certain criteria for determining whether or not the prosecuting attorney is acting in a quasi-judicial role. And it says flat out that giving advice, legal advice, is operating or acting in a quasi-judicial role.

Now, the testimony in this case about Defendant Reed is both the police officers--Cox and the other officer, Scroggins--agree that they called Reed on the phone at his home. Well, his home is immaterial. But, anyway, they called him on the phone and asked if it would be proper or permissible to hypnotize the plaintiff. And he said yes.

I don't think there is any question that is giving legal advice. He didn't initiate it. He didn't suggest it. According to his testimony, which is the only positive testimony on the subject, he was home cutting his yard or something. At least he was home when the call came. So he was giving legal advice.

On the seeking of the arrest without a warrant, there is a conflict in the evidence as to whether the plaintiff was arrested before or after someone talked to Mr. Reed. But the evidence that someone did talk to Mr. Reed was simply that the police officer asked Reed if in his opinion there was probable cause for the arrest of the plaintiff; to which the response was yes. There again, that's calling for a legal opinion which he gave. He says he was under the impression there was a separate confession other than on the tape or on the hypnotic session which, of course, there was not. But that's beside the point. The question was is there probable cause to arrest this lady. And he said yes, I think so. That's a legal opinion.

Finally as to getting the search warrant, you can characterize the proceeding before the judge as testimony by Mr. Reed. And if he asked leading questions--and I think he did--why, of course, you can say that. But the fact is that it was a proceeding in court before a judge. No matter what the form of the question was, the person seeking the search warrant and doing the testifying was the police officer. And what Mr. Reed was doing was doing his job as a deputy prosecuting attorney and presenting that evidence. Even though it was fragmentary and didn't go far enough, he did it as a part of his official duties.

The fourth phase was publicity. There is no evidence at all on that.

So under the authority of the *Henderson v. Lopez* case, having heard the plaintiff's evidence, I find with some regret that I feel compelled to take this matter from the jury and return a finding pursuant to Rule 50 in favor of the defendant.

I say with some regret because this is a very interesting case. And I would really like to know what the jury would have done with it. There is no question, of course, that what these police officers did was in violation of the plaintiff's rights.

I certainly don't believe that the plaintiff shot her sons. I certainly would not wish the news media to give any impression that the evidence here in any respect would reflect upon the plaintiff. The evidence here discloses that the police officers up there at Muncie conducted a highly improper--you might call it a--well, highly improper all-day interrogation of the plaintiff, refused to let her go to lunch, kept after her when she was sick, conned her into submitting to hypnosis, and then suggested a number of things to her when she gave answers that they didn't like.

I am wholly in accord with the testimony of the psychiatrist--and the psychologist, I believe--that this was a highly improper thing for them to do.

But, of course, she has recovered substantial judgments against both of these police officers and also the third party as I recall. So the question this week was simply what does she have against Mr. Reed. Well, Mr. Reed is not to be patted on the back for not having gone into this matter a little more deeply. It's easy to say that in afterthought.

But, on the other hand, and as a practical matter, we know that attorneys are called on every day and very frequently to give opinions in all sorts of matters. It's easy to say after the fact he was careless or negligent. But the real question is did he have absolute immunity when acting as a lawyer in giving legal advice and presenting a matter in court. And the answer to that is yes, he did. That's my view.

And, therefore, judgment, as I said, will be entered for the defendant. Bring in the jury.

MR. SUTHERLIN: Your Honor, at some point, may I address the Court before the jury is brought in just very briefly. I know the Court has made its ruling. I neglected to make a couple of arguments.

THE COURT: Go ahead.

MR. SUTHERLIN: Because the Court prohibited us from eliciting from any of the witnesses the law on the role of the prosecutor and his duties--we couldn't present evidence because it's a matter of law--Mr. Dick Good would have testified that under the scheme of the judicial system in the State of Indiana, the prosecutor is considered a constitutional officer. And his definition places him under the judiciary, unlike in other states in the federal system where he is under the executive branch. He would have also offered his opinion that the prosecutor can as a judicial officer arrest. That's one thing.

The decision to comment on probable cause may in fact be a group decision to arrest. As the Court is well aware, arrest doesn't take place simply because the strong arm of the law is placed on the shoulder of a defendant.

It's based upon circumstances. The reading of *Henderson* though suggests very clearly the distinction, and I hope that the Court would have noted the distinction. In *Henderson* there was a statutory provision which required that the assistant attorney to give legal advice. We heard over and over again that

the function of the attorneys in this state or the prosecutors in this state are clearly defined by statute and no other way. There is no statutory provision in the State of Indiana, no provision whatsoever, no case that they can cite which permits the prosecutor to give advice and still have absolute immunity.

THE COURT: Well, you can take that up to the Seventh Circuit, Mr. Sutherlin.

Appendix C
Transcript of Hearing before The Honorable Betty Shelton Cole held on September 22, 1982

The following is a reproduction of the transcript of the hearing regarding probable cause for the issuance of the search warrant.

THE COURT: Alright. Alright, Mr. Reed? Proceed, please.

RICHARD W. REED, ESQ.: Yes, your Honor. This is the matter of a probable cause by sworn testimony for the purpose of obtaining a search warrant and I would ask that the Court swear the witness, Lieutenant Scroggins.

THE COURT: Alright. Lieutenant Scroggins, please raise your right hand and be sworn.

DONALD SCROGGINS, after first being duly sworn to testify the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

QUESTIONS BY RICHARD W. REED:

Q. State your name to the Court, please.
A. Donald Scroggins.
Q. And, your occupation, sir?
A. Police officer for the city of Muncie.
Q. Did I get your rank right? Are you Lieutenant or is it Sergeant?
A. At the present time, I am a Sergeant.
Q. And, are you in the Investigative Division of the Muncie Police Department?
A. Yes. I am.
Q. Ah, Sergeant Scroggins, did there come a time when you investigated the shooting of two children?
A. Yes. I did.
Q. And, when did that shooting occur?
A. September the third, nineteen-eighty-two.
Q. And, ah, were those the children of one Cathy Sells?
A. Yes. They were.
Q. And, did you go to the residence during your investigation?
A. Yes. I did.

Q. And what did your investigation reveal concerning the children being shot?
A. Our investigation revealed that the oldest child had been shot twice in the head and the youngest child has been shot twice in the body.
Q. Did there come a time during the course of your investigation when you, ah, had occasion to, ah, interview Cathy Sells, the mother of these two children?
A. Yes. I did.
Q. And, was that yesterday?
A. Yes.
Q. Among other times?
A. Yes.
Q. And, during that interview, did Cathy Sells eventually say to you that she had shot those children?
A. Yes. She did.
Q. And, did she also tell you that at the time she was doing that, ah, that she was wearing a Halloween mask? A certain curly wig, dark in color and Afro in style and a pair of coveralls?
A. Yes. She did.
Q. Did she also tell you that she shot these children with a certain twenty-two caliber handgun described as a shiny one with broken grips and twenty-two caliber ammunition?
A. Yes. She did.
Q. Did she tell you, ah, that since that shooting, she has been moving and that the house that she was moving from is located on east thirteenth street, a two-story frame house with white aluminum siding with glassed-in front porch and the second house being the second house east of south Elm Street on the north side of east Thirteen Street in Muncie, Delaware County, Indiana known as four-o-six east Thirteenth Street?
A. That's true.
Q. And, that after the shooting, she started moving some of her property to a one-story frame house with white wood siding, the first house west of south Madison Street on the north side of east Thirteenth Street, Muncie this residence having an address of four-sixteen east Thirteen Street, Muncie, Indiana?

A. Ah, I don't know if I understood you correct, but, she lived at four-sixteen east Thirteenth and she's moving to four-o-six east Thirteenth.
Q. So, she told you last night, last night being the twenty-first day of September, nineteen-eighty-two, that she had moved, that there is property of hers in both those places?
A. Yes. She did.
Q. Did she also tell you that she had, ah, and do you know for a fact she has a green nineteen-seventy-eight Datsun automobile, nineteen-eighty-two Indiana registration eighteen-A-sixty-nine-thirty?
A. Yes. She did.
Q. And, did she tell you during the interview last night that the wig and the Halloween mas, ah, the handgun and the coveralls could be in any of those three locations and that she was not sure in which particular house all of those items might be found?
A. Yes. She did.
Q. Or that they might even be in her car since she was in the process of moving these things back and forth?
A. Yes. She did.
Q. But, she did, in fact, tell you, did she not, that they would be in one of those places?
A. Yes. She did.
Q. And, is this the basis for your seeking a search warrant to discover those items which are evidence of a crime?
A. Yes. It is.
Q. The events to which you have testified occurred in Delaware County, Indiana. Is that correct?
A. Yes. They did.
Q. Is there anything else you'd like to tell the Judge about that?
A. No.
MR. REED: That's all, your Honor.
THE COURT: Thank you. Very well, the Court, is there any further testimony, sir?
MR. REED: No, your Honor.
THE COURT: The Court specifically determines that probable cause exists for the search of the premises at four-o-six east Thirteen Street, also four-sixteen east Thirteen Street and a certain green nineteen-seventy-eight Datsun automobile, all as per the testimony given this date at, ah,

two-forty-five P.M., September the twenty-second, nineteen-eighty-two.
MR. REED: Thank you, your Honor.
THE COURT: Thank you.
(OFF RECORD)

Appendix D
Statutory Provisions

42 U.S.C. § 1983 (1982) reads as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Indiana Code 33-14-1-3 (1971) reads as follows:

Duty when informed of crimes.--Whenever any prosecuting or district attorney shall receive information of the commission of any felony or such district attorney of the commission of any misdemeanor he shall cause process of issue from a court having jurisdiction to issue the same, (except the circuit court,) to the proper officer, directing him to subpoena the persons herein named likely to be acquainted with the commission of such felony or misdemeanor, and shall examine any person so subpoenaed before such court touching such offense, and if the facts thus elicited are sufficient to establish a reasonable presumption of guilt against the party charged, said court shall cause so much of said testimony as amounts to a charge of a felony or misdemeanor to be reduced to writing and subscribed and sworn to by such witness, whereupon such court shall cause process to issue for the apprehension of the accused as in other cases.

Indiana Code 35-33-1-1 reads as follows:

Arrest by law enforcement officers.--A law enforcement officer may arrest a person when:

(1) He has a warrant commanding that the person be arrested;

(2) He has probable cause to believe the person has committed or attempted to commit, or is committing or attempting to commit a felony;

(3) He has probable cause to believe the person has violated the provisions if IC 9-4-1-40, IC 9-4-1-54 [repealed], or IC 9-11-2; or

(4) He has probable cause to believe the person is committing or attempting to commit a misdemeanor in his presence [IC 35-33-1-1, as added by Acts 1981, P.L. 298, § 2; P.L. 204, § 6; P.L. 320-1983, § 2.]

Indiana Code 35-41-1-17 reads as follows:

Law enforcement officer.--"Law Enforcement Officer" means:

(1) A police officer, sheriff, constable, marshal, or prosecuting attorney;

(2) A deputy of any of those persons; or

(3) An investigator for a prosecuting attorney. [IC 35-41-1-17 as added by P.L.311-1983, § 18].